

**BEFORE THE HEARING OFFICER  
EMPOWERED BY THE  
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

<b>IN THE MATTER OF :</b>	)	
	)	
,	)	
	)	<b>Petitioner</b>
	)	
<b>and</b>	)	
	)	
<b>FRANCIS HOWELL R-III SCHOOL DISTRICT</b>	)	
	)	
	)	<b>Respondent</b>

**COVER SHEET INFORMATION**

1. ("Student") is the son of ("Parents"). Student was born on . Student's Student identification number is . Student's Social Security Number is .
  
2. At all times material to this due process proceeding, Student resided with Parents in St. Charles, Missouri, which is located within the boundaries of the Francis Howell School District.
  
3. The Parents and Student were not represented at the hearing by legal counsel.
  
4. The Francis Howell School District were represented by:

James G. Thomeczek  
Thomeczek Law Firm, L.L.C.  
1120 Olivette Executive Parkway  
Suite 210  
St. Louis, Missouri
  
5. Parents requested due process by letter to the Department of Elementary and Secondary Education ("DESE") dated October 1, 2001 which was received by DESE on October 1, 2001.

**BEFORE THE HEARING OFFICER  
EMPOWERED BY THE  
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

**IN THE MATTER OF :**

,

**Petitioner**

**and**

**FRANCIS HOWELL R-III SCHOOL  
DISTRICT**

**Respondent**

**FINDING OF FACT, CONCLUSIONS OF LAW,  
DECISION AND ORDER**

The Hearing Officer, after conducting the expedited due process hearing in this matter on November 8 and 9, 2001, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

**I. FINDINGS OF FACT**

The Hearing Officer, makes the following Findings of Fact:

**A. The Parties**

1. The Petitioner<sup>1</sup> resided with his Parents within the boundaries of the Francis Howell School District ("School District") at all times relevant to this due process proceeding.
2. The School District is a Missouri school district organized pursuant to Missouri statutes.
3. The Student and Parents were not represented at the hearing by legal counsel. Prior to the hearing the Parents were provided with *The Procedural Safeguards for Children and Parents*, understood that they had the right to be represented by legal counsel at the hearing and voluntarily elected not to be represented. The Parents were assisted at the hearing by Vickie Teson, a child advocate. Parents are both literate, consider English to be their primary language (R Exh 2, p. 19) and made no claim at the hearing that either had a disability that prevented them from communicating in writing.

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<sup>1</sup> Petitioner shall be referred to herein as the "Student".

4. The School District was represented by James G. Thomeczek, Thomeczek Law Firm, L.L.C., 1120 Olivette Executive Parkway, Suite 210, St. Louis, Missouri.
5. The Hearing Officer for the expedited due process proceeding was Ransom A Ellis, III.
6. During all times relevant to this proceeding the following persons were employed by the School District and provided educational services to the Student:

Dr. Daniel O'Donnell	Superintendent
Dr. Liz Schmitz	Associate Superintendent
Judy Cochrane	Executive Director of Alternative Education
Greg Batenhorst	Principal, Barnwell Middle School
Phil Milligan	Assistant Principal, Barnwell Middle School
Donra Yochum	Counselor, Barnwell Middle School
Phillip Bouchard	Counselor, Harvest Ridge Elementary School
Bruce Nappier	Teacher, Harvest Ridge Elementary School
Debby Ridenhower	Teacher, Harvest Ridge Elementary School
Angela Beerman	Teacher, Barnwell Middle School
LaVonna Anderson	Teacher, Barnwell Middle School
Chris Rausch	Teacher, Barnwell Middle School
Cherie Orf	Teacher, Barnwell Middle School
Michelle White	Teacher, Barnwell Middle School
Laura Kroeger	Teacher, Barnwell Middle School
Debra Biasi	Teacher, Barnwell Middle School
Julie Elfrink	Teacher, Barnwell Middle School
Cindy McGrail	Teacher, Barnwell Middle School
Robyn Fay	Teacher, Barnwell Middle School
Kristen Simonds	Special Education Teacher, Barnwell Middle School

## **B. Procedural Background**

7. On or about October 1, 2001, the Parents sent a letter to DESE requesting a due process hearing. (HO Exh 1) The request for an expedited due process hearing was received by DESE on October 1, 2001.
8. On or about October 2, 2001, Ms. Pam Williams, Director for Special Education Compliance at DESE notified the Hearing Officer (HO Exh 3) that he had been assigned to hear the expedited due process request.
9. On or about October 2, 2001, Ms. Williams provided Parents with a copy of the *Procedural Safeguards for Parents and Children* (HO Exh 2). On or about October 4, 2001, the Hearing Officer provided the Parents with a copy of the *Procedural Safeguards for Parents and Children* (HO Exh 5). The Hearing Officer also notified the Parent and School District that the expedited due process hearing had to be held and a written decision rendered by November 15, 2001. (HO Exh 4)

10. On or about October 4, 2001 the Hearing Officer issued a Notice of Hearing setting this case for hearing on November 8, 2001 (HO Exh 4).

11. On November 2, 2001 the School District and Parents transmitted their exhibit list, witness list and exhibits to the Hearing Officer and to each other.

12. On November 8 and 9, 2001 the expedited due process proceeding was held in the Administrative Offices of the School District with all parties in attendance. The hearing was closed at the request of the Parents. The hearing concluded and the record was closed on November 9, 2001.

13. Exhibits were introduced and received into evidence at the hearing. The following documents were admitted and made a part of the record in this case: Hearing Officer Exhibits ("HO Exh") 1 through 6; Petitioner's Exhibits ("P Exh") pages 1 through 35, 37 through 76, 79, 84 through 91 and 93 through 149; and Respondent Exhibits ("R Exh") 1 through 27.

14. The parties were given an opportunity to provide the Hearing Officer with a brief or written statement of position following the hearing. A Post-Hearing Brief was received from counsel for the School District. No brief or written statement was received from the Parents.

### **C. The Issue And Relief Requested**

15. The parties agreed that the only issue to be presented to the Hearing Officer was whether the School District was deemed to have knowledge that the Student was a child with a disability under the Individuals With Disabilities Education Act ("IDEA") before the September 5, 2001 discipline was issued.

16. The Parents stated that the relief they were requesting was as follows:

A. An appropriate placement for the Student during the remainder of the Student's disciplinary suspension — either in the regular educational classrooms at Barnwell Middle School or at the Metropolitan private school.

B. An independent educational evaluation for the Student.

17. The School District objected to the proposed remedy requested by the Parents. In addition, in its Post-Hearing Brief, the School District "questioned" whether an expedited due process proceeding is available to the Parent for the issue stipulated to by the parties.

### **D. Background Facts**

18. The Student entered the School District on July 19, 1994, at the beginning of school year 1994-95, his Kindergarten year. The Student attended John Weldon Elementary School for Kindergarten, First grade and part of the Second grade. The Student attended Harvest Ridge Elementary School ("Harvest Ridge") for part of the Second grade, Third grade, Fourth grade and Fifth grade. The Student attended Barnwell Middle School ("Barnwell") for the Sixth grade and

part of the Seventh grade. Since September 5, 2001, the Student has been suspended from school for a disciplinary infraction which occurred on September 5, 2001.

19. The School District maintains a program called the Student Teacher Assessment Team ("STAT"). This program is designed, in part, to assist in the identification and referral of children with disabilities within the School District.

20. During school year 1998-99, the Student was in the Fourth Grade at Harvest Ridge. Initially, the Student was assigned to Bruce Nappier's classroom. The Student experienced disciplinary problems early in the school year. Philip Bouchard, Counselor at Harvest Ridge testified that the Student's problems were "immediately resolved" when he was reassigned to Debby Ridenhower's classroom. The Student's grade report for school year 1998-99 (R Exh 3, p. 25) indicates that the Student received the following grades that school year:

<u>Subject</u>	1	2	3	4
Reading	B	B	B	B
Spelling	A	B	A	A
Language	A	A	B	B
Mathematics	B	A	B	C
Social Studies	B	A	A	A
Science	A	B	X	B
Health	X	X	A	X

21. During school year 1998-99, Student's parents did not express in writing or otherwise, that the Student needed special education or related services or should be educationally evaluated for a disability. Likewise, the Student's teachers did not express concern about the Student's behavior or performance to the School District's director of special education or refer the Student for screening or an educational evaluation through STAT or otherwise. The Student's behavior and educational performance during school year 1998-99 did not demonstrate a need for special educational or related services.

22. During school year 1999-2000, the Student was in the Fifth Grade at Harvest Ridge. The Student was assigned to Ms. Pryor's classroom. At the request of the Parents, Mr. Bouchard continued to monitor the Student's progress. The Student experienced few disciplinary problems during the school year. The Student's grade report for school year 1999-2000 (R Exh 3, p. 26) indicates that the Student received the following grades that school year:

<u>Subject</u>	1	2	3	4
Reading	C	C	C	B
Spelling	C	B	A	A
Language	C	B	A	B
Mathematics	D	C	D	C
Social Studies	B	B	A	A
Science	C	B	A	A
Health	X	X	X	A

23. During school year 1999-2000, Student's parents did not express in writing or otherwise, that the Student needed special education or related services or should be educationally evaluated for a disability.<sup>2</sup> Likewise, the Student's teachers did not express concern about the Student's behavior or performance to the School District's director of special education or refer the Student for screening or an educational evaluation through STAT or otherwise. The Student's behavior and educational performance during school year 1999-2000 did not demonstrate a need for special educational or related services.

24. During school year 2000-01, the Student was in the Sixth Grade at Barnwell Middle School. The Student was assigned to the Olympiad Team which consisted of staff members Angela Beerman (Social Studies/Math), LaVonna Anderson (Language Arts/Science), Chris Rausch (Physical Education) and Kristen Simonds (Special Education). On August 14, 2000, Parent completed a Student Health Inventory form which indicated that the Student did not have a disability and that the Student was not receiving care for ADD/ADHD. (R Exh 7, p.53).

25. During school year 2000-01, the Student received a number of disciplinary detention notices and office referral notices. Detention notices were generally less serious violations which were dealt with by the individual teacher or the Student's Middle School Team. Office referrals were more serious infractions, or repeated less serious infractions, and were dealt with by the Principal or Assistant Principal. Conduct which results in an office referral may result in a range of consequences including an out-of-school suspension. Generally, the Student's Middle School Team was aware of and periodically discussed the Student's disciplinary problems. The notices received by the Student during school year 2000-01 were as follows:

<u>Date</u>	<u>Detention/Referral</u>	<u>Teacher</u>	<u>Nature of Violation</u>
09/29/00	Detention	Orf	Disruptive and talkative in class
09/29/00	Detention	Chmelweski	Disruptive behavior during school assembly
10/03/00	Detention	White	Excessive talking
10/09/00	Detention	Orf	Disruptive and loud talking in class
10/11/00	Detention	White	Excessive talking and laughing
10/11/00	Detention	Orf	Bickering with another student, disruptive
10/12/00	Referral	White	Disruptive and disrespectful
10/12/00	Detention	White	Profanity, refusal to do work
10/13/00	Referral	Milligan	Punching another student several times

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<sup>2</sup> The record indicates that in September, 1998 the Student was first seen by Dr. Richard Anderson, a psychologist in St. Charles, Missouri. In a letter dated September 17, 2001 which is presented in the record as P Exh p. 79, Dr. Anderson states that the Student had been medically diagnosed as having Attention Deficit Disorder and Oppositional Defiance Disorder. The letter was not presented to School District prior to the occurrence of the behavior that precipitated the disciplinary action which is the subject of this case or prior to the School District taking disciplinary measures against the Student.

10/18/00	Referral	Koeller	Failure to complete work assigned in ISAP
10/20/00	Referral	White	Screaming, fighting, laughing. Threatened teacher. Hit student
10/20/00	Detention	Anderson	Excessive talking and laughing. Removed from class
10/20/00	Detention	Anderson	Rude to substitute, refusal to cooperate
10/20/00	Referral	Chmielewski	Disruptive in class
11/06/00	Referral	Chmielewski	Removed for class, disruptive
11/28/00	Detention	Ervin	Disobeyed teacher
11/29/00	Bus violation	Bus	Standing up, throwing paper balls
11/30/00	Detention	Anderson	???
12/07/00	Referral	Milligan	"Smacked" another student on back of head
02/01/01	Detention	Orf	Tardy, lying to teacher
02/12/01	Referral	Orf	Tardy
03/05/01	Detention	Beerman	Came to class without book, incomplete work
03/30/01	Detention	Price	Pushed another student in hall
04/04/01	Detention	Orf	Talked out loud, called student "stupid"
04/19/01	Detention	Orf	Tardy
04/26/01	Detention	Eckert	Failed to follow teacher's directions
04/30/01	Detention	Orf	Tardy
05/07/01	Detention	Orf	Tardy
05/22/01	Referral	Orf	Threatened to fight a student

26. The Student's grade report for school year 2000-01 (Resp Exh 14, p. 86) indicates that the Student received the following grades that school year:

<u>Subject</u>		1	2	3	4
Math 6	B	B	B	B	
Language Arts	F	D	B	F	
Study Skills		D	B	B	C
Explo Wheel		B	A	C	A
Science		D	B	C	B
PE 6		B	B	A	A

27. Three of Student's school year 2000-01 teachers, Angela Beerman, Cherie Orf and Chris Rausch testified at the hearing. Barnwell's Assistant Principal, Phillip Milligan, and the Counselor, Donra Yochum, also testified. These witnesses indicated that it is not unusual for sixth grade students to have adjustment problems early in the school year. Mr. Milligan characterized Student's disciplinary difficulties as being in the "high average" range when compared to his sixth grade peers. Ms. Beerman, Ms. Orf and Mr. Rausch indicated that while the Student had periodic disciplinary problems they did not consider his conduct to be serious and he continued to improve throughout the year. Notwithstanding the discipline problems, the Student's grades were not affected by his conduct. Where his grades showed deficiencies, it was more a result of his failure to complete and/or turn in his assignments, rather than his inability to perform the work.

28. The Student's Grade and Progress reports bear this out. Specifically, Student's progress report issued halfway through quarter one indicates that various teachers felt that the Student had "good classroom behavior", but "comes unprepared for class" and had "disruptive behavior/talking". (P Exh p. 118). Student's first quarter grade report states that during the first quarter he had "work incomplete/missing", "comes unprepared for class", "unsatisfactory behavior", and exhibits "disruptive behavior/talking". (P Exh p. 115). The progress report issued halfway through the second quarter indicates "effort has improved", "behavior has improved" but, "work incomplete/missing". (P Exh p. 113). Student's second quarter grade report shows an improvement in grades and comments "good classroom behavior" but, "disruptive behavior/talking". (P Exh p. 108). The progress report issued halfway through the fourth quarter indicates "work incomplete/missing" but makes no comments about the Student's behavior. (P Exh p. 106). Student's fourth quarter/second semester grade report indicates that the Student's grades had improved or stayed the same in all his classes, except one where the comment is made "comes unprepared for class". There are no comments on this grade report about the Student's behavior. (P Exh. P. 100).

29. Around the end of the first semester of school year 2000-01, Parents informed the School District that the Student had been medically diagnosed as having Attention Deficit Hyperactivity Disorder for which he was taking Adderall.<sup>3</sup> Several of the School District employees who testified indicated that they learned about the Student's medical diagnosis at some point during that school year.

30. Notwithstanding, during school year 2000-01, Student's parents did not express in writing or otherwise, that the Student needed special education or related services or should be educationally evaluated for a disability. Likewise, the Student's teachers did not express a concern about the Student's behavior or performance to the School District's director of special education or refer the Student for screening or an educational evaluation through STAT or otherwise. The Student's behavior and educational performance during school year 2000-01 did not demonstrate a need for special educational or related services.

31. On or around August 13, 2001 Parents prepared and submitted a Student Health Inventory form to the School District. (R Exh 11). This form indicates that the Student is receiving treatment from a physician for ADD/ADHD.

32. On September 5, 2001, shortly after the Student and other students alighted from a School District bus at or near the school bus stop at Sherman Drive and Sherman Park, a fellow female student made a remark to the Student. In response, the Student pulled a knife from his pocket, opened it and displayed it in a threatening manner, in the opinion of the School District. The

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<sup>3</sup> Parents provided the School District with a Medication Form dated November 28, 2000. (P. Exh p. 91; R Exh 9, p. 58) and a letter from Dr. Brad Berger dated December 29, 2000 (P Exh p. 89) both of which indicate that the Student had been medically diagnosed as having Attention Deficit Hyperactivity Disorder.



knife was presented at the hearing and photocopied for the record. (HO Exh 6). The knife has a black composite handle, is of lock-back design with a sharp, serrated two and one-half inch blade.

33. Gregory Batenhorst, Principal at Barnwell Middle School, testified that when confronted with the incident the Student admitted his conduct at the bus stop and admitted that he brought the knife to school on September 5, 2001 and left in his backpack, in his locker, during the school day.

34. On September 5, 2001 Mr. Batenhorst sent a letter to the Parents which informed them that he had suspended the Student for ten (10) school days for the incident on September 5, 2001. (R Exh 14, pp. 84-87). The letter also informed the Parents that a Committee on Conduct meeting<sup>4</sup> had been scheduled to determine whether Mr. Batenhorst's summary suspension of the Student should be extended by the School District's Superintendent.

35. Prior to the Committee on Conduct meeting, Counselor Donra Yochum requested that each of Student's teachers fill out a questionnaire concerning the Student. (P Exh pp. 141-149). Ms. Yochum then summarized the responses on a Committee on Conduct Guidance Report form. (R Exh 15, pp 92-93). Ms. Yochum's summary of the teacher reports is as follows:

"A. Behavior in Class — Teachers report that in the majority of his classes [the Student] generally behaves quite well but needs to be redirected when he becomes too talkative. Sometimes his blurting out is frustrating. PE and FACS can be problem classes for [the Student]. At time in PE and FACS [the Student] has been rude and disrespectful to the teacher. In FACS [the Student] participate in class discussions but is unwilling to put forth his best efforts when written work is required. In art [the Student] often spends class time out of his seat socializing.

B. Relationship With his Peers — [The Student] appears to get along well with his peers. (In one class he boasted that he enjoyed picking on a particular student last year. That student is at this time in the class in which the comment was made.)

C. Behavior With Teacher and/or Adults — In most of [the Student's] classes he is respectful and attentive most of the time; however, in PE and FACS, the scenario is different. He shows little respect for the teachers, does not usually make eye contact, and can be disruptive.

D. Attitude Toward School — It appears that [the Student] enjoys the social aspect of school, but does not seem wholly interested in the academic aspect. He does not always follow directions and has stated aloud that he plans on getting detentions."

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<sup>4</sup> At times in the record the Committee on Conduct meeting is referred to as a "Code of Conduct Meeting."

36. Ms. Yochum's summary of the teacher comments was made from the questionnaire sheets prepared by the Student's teachers and from her follow-up discussions with the teachers. Her summary is consistent with the testimony of several of the Student's teachers and the information contained on the questionnaires. I find Ms. Yochum's testimony to be credible and the summary she prepared for the Committee on Conduct to provide an accurate picture of the Student's behavior and performance immediately prior to the occurrence of the behavior that precipitated the disciplinary action which is the subject of this case.

37. On or around September 13, 2001 the Committee on Conduct met to form a recommendation to the School District's Superintendent as to whether the Student's summary suspension should be extended. (R Exh 15, pp. 89-90). During the meeting the conduct of the Student was reviewed and the Student and Parents were allowed to provide input. The notes of the meeting indicate that the Parents commented that the Student's conduct was an "impulsive act of [an] ADHD child." (R Exh 15, p 90). The report states the following under "Committee Input":

"Review of Possible manifestation — parent and committee agree that this is not [a] manifestation of the ADHD — was not an impulsive act.

At the due process hearing the Parents stated that they did not agreed at the meeting that the conduct was not a manifestation of the Student's ADHD. Whether the Parents agreed or did not agree with the determination of the Committee, the acts of the Student were not a manifestation of his medically diagnosed ADHD condition in that, at a minimum, the act bringing the knife to school and possession of the knife at school were not impulsive acts.

38. On or about September 17, 2001 the Dr. David O'Donnell, the School District's Superintendent notified the Parents that he had extended the Principal's summary suspension of the Student to one hundred eighty (180) school days, offered the Student the opportunity to attend the ACE program, an alternative school and advised the Parents that they had the right to appeal his decision. (R Exh 17, p. 95). The Parents elected not to appeal Dr. O' Donnell's decision. (P Exh p. 11).

39. The documentary exhibits in the record contain ten (10) letters from the Parents to the School District. Five (5) of these letters were dated before the behavior that precipitated the disciplinary action occurred and before the School District took disciplinary measures against the Student. (P Exh p. 74, dated December 8, 1999 to Mrs. Pryor; P Exh p. 75, dated December 8, 1999 to Mrs. Straub; P Exh p. 110, dated December 5, 2000 to Angela Beerman; P Exh p. 104, to Angela Beerman; and, R Exh 12, p. 64, dated August 28, 2001 to Robyn Fay). Likewise, five (5) of these letters were dated after the behavior that precipitated the disciplinary action occurred and after the School District took disciplinary measures against the Student. (P Exh p. 15, dated October 1, 2001 to Dr. Daniel O'Donnell; P Exh p. 11, dated October 9, 2001 to Dr. David O' Donnell; P Exh p. 10, dated October 10, 2001 to Judy Cochrane; P. Exh p. 9, dated October 16, 2001 to Dr. Daniel O'Donnell; and, P. Exh p. 8, dated October 23, 2001 to Judy Cochrane). At no time before September 5, 2001, the day the behavior that precipitated the disciplinary action occurred or before September 17, 2001 the day the School District finalized the

disciplinary measures against the Student did the Parents express a written concern that the Student was in need of special education and related services.

40. The Parents orally informed the School District, before September 5, 2001 that the Student had been diagnosed as having ADHD and was taking Adderall for the condition. However, there is no evidence on the record that before September 5, 2001, the day the behavior that precipitated the disciplinary action occurred or before September 17, 2001 the day the School District finalized the disciplinary measures against the Student that the Parents expressed an oral concern that the Student was in need of special education and related services.

41. At no time before September 5, 2001, the day the behavior that precipitated the disciplinary action occurred or before September 17, 2001 the day the School District finalized the disciplinary measures against the Student, did the behavior and performance of the Student demonstrate the need for special education and related services.

42. At no time before September 5, 2001, the day the behavior that precipitated the disciplinary action occurred, did the Parents request an evaluation of the Student pursuant to 34 C.F.R. §§ 330.530 – 300.536.

43. At no time before September 5, 2001, the day the behavior that precipitated the disciplinary action occurred, or before September 17, 2001 the day the School District finalized the disciplinary measures against the Student, did any teacher of the Student, or other personnel of the School District, express concern about the behavior or performance of the Student to the director of special education of the School District or to other personnel in accordance with the School District's established child find or special education referral system.

## **II. CONCLUSIONS OF LAW**

The Hearing Officer makes the following Conclusions of Law:

44. The Individuals with Disabilities Education Act, ("IDEA"), 20 U.S.C. §1400 et seq. and the IDEA regulations, 34 C.F.R. Parts 300-301 set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the School District, in providing special education and related services to students with disabilities.

45. The *State Plan for Part B of the Individuals With Disabilities Education Act (1996)*, ("1996 State Plan") was in effect at the time of the Student's behavior on September 5, 2001. The 1996 State Plan was amended by the *Missouri State Plan for Special Education (2001)* ("2001 State Plan"), which came into effect on October 1, 2001, the same day the Parents' Request for Due Process was filed. Both State Plans constitute regulations of the State of Missouri which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the School District, in providing special education and related services to students with disabilities. The 1996 State Plan applies to the substantive questions presented in this proceeding such as the knowledge of the School District and the propriety of its actions before September 5, 2001. The 2001 State Plan applies to the procedural aspects of this request for expedited due process.

46. This due process proceeding is conducted pursuant to the expedited hearing procedures set forth in the 2001 State Plan, Regulation V, p. 62, the IDEA and Section 162.961.6 RSMo. Section 162.961.6 states:

“6. *An expedited due process hearing by the state board of education may be requested by a parent to challenge a discipline placement to an interim alternative educational setting*, or to challenge a manifestation determination in connection with a disciplinary action involving a forty-five day placement for weapons, drugs, or because the child is a danger to himself or others, or by a responsible educational agency to seek a forty-five day alternative educational placement for a dangerous or violent student. The board or its delegated representative shall appoint a hearing officer to hear the case and render a decision within the timeline required by federal law and state regulations implementing federal law. The hearing officer shall be an attorney licensed to practice law in this state. The hearing officer shall have some knowledge or training involving children with disabilities, shall not have a personal or professional interest which would conflict with his or her objectivity in the hearing, and shall meet the department of elementary and secondary education's training and assessment requirements pursuant to state regulations. A specific extension of the timeline is only permissible to the extent consistent with federal law and pursuant to state regulations.” [emphasis added].

The issue stipulated to by both parties, in effect, challenges the discipline placement given to the Student as a result of his September 5, 2001 conduct. As a result, the Hearing Officer has jurisdiction over the issue.

47. The Parents have the burden of proof on the issue presented to the Hearing Officer for decision in this case. See: *Colvin by Colvin v. Lowndes County School District*, 32 IDELR 32, p 4, (DC MS 2000).

48. The IDEA regulations, 34 C.F.R. § 300.527 sets forth the standard by which the facts of this case must be judged. That regulation states:

**“§ 300.527 Protections for children not yet eligible for special education and related services.**

(a) *General.* A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in §§ 300.520 or 300.521, may assert any of the protections provided for in this part if the LEA had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) *Basis of knowledge.* An LEA must be deemed to have knowledge that a child is a child with a disability if –

(1) The parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(2) The behavior or performance of the child demonstrates the need for these services, in accordance with § 300.7;

(3) The parent of the child has requested an evaluation of the child pursuant to §§ 300.530 – 300.536; or

(4) The teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of the agency or to other personnel in accordance with the agency's established child find or special education referral system.

(c) . . .

(d) *Conditions that apply if no basis of knowledge.*

(1) *General.* If an LEA does not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with paragraph (d)(2) of this section.

(2) *Limitations.*

(i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under § 300.520 or 300.521, the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

(iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this part, including the requirements of §§ 300.520 – 300.529 and section 612(a)(i)(A) of the Act.”

49. On and before November 9, 2001, the last day of the due process hearing, the Student had not been determined to be eligible for special education and related services.

50. The Student is a “child who has not been determined to be eligible for special education and related services under [34 C.F.R. Part 300] and who had engaged in behavior that violated [a] rule or code of conduct of the [School District].”

51. At no time before September 5, 2001, the day the behavior that precipitated the disciplinary action occurred or before September 17, 2001, the day the School District finalized the disciplinary measures against the Student:

- A. did the Parents express a written concern that the Student was in need of special education and related services;
- B. did the behavior and performance of the Student demonstrate the need for special education and related services.
- C. did the Parents request an evaluation of the Student pursuant to 34 C.F.R. §§ 330.530 – 300.536;
- D. did any teacher of the Student, or other personnel of the School District, express concern about the behavior or performance of the Student to the director of special education of the School District or to other personnel in accordance with the School District’s established child find or special education referral system.

52. Even if the Student was a “child with a disability” under the IDEA due to his ADHD condition, and even if the School District had knowledge that the Student was a “child with a disability” before September 5, 2001, the day the conduct occurred which precipitated the disciplinary action, the Students’s act of bringing the knife to school and possessing the knife at school and on a school bus was not a manifestation of the Student’s ADHD condition.

### **III. DECISION**

The Hearing Officer makes the following findings regarding the issue presented to him by the parties:

53. Issue— Whether the School District was deemed to have knowledge that the Student was a child with a disability under the IDEA before the September 5, 2001 discipline was issued.

**Decision** — On September 5, 2001, the Student took a knife to school on the school bus, possessed the knife in the school building, took the knife with him on the school bus home and pulled the knife in a threatening manner toward a fellow student at or near the school bus stop. As a result of this conduct, on September 5, 2001, the Student was initially suspended by his Principal for ten (10) school days. After a Committee on Conduct meeting, on September 17, 2001, the School District’s Superintendent extended the Student’s summary suspension because of the conduct, to a one hundred eighty (180) school day suspension and offered the Student an alternate educational placement in the School District’s ACE program.

At the time of the conduct on September 5, 2001, the Student had not been identified as a “child with a disability” under the IDEA. Accordingly, this case must be analyzed pursuant to the provisions of 34 C.F.R. § 300.527 – *Protections for children not yet eligible for special education and related services*. This regulation resulted from the 1997 amendments to the IDEA which, in part, extended the protections afforded to eligible students to some students who had not been determined to be eligible for special education and related services.

The general test established by Section 300.527 is whether the School District “had knowledge . . . that the child was a child with a disability before the behavior that precipitated the

disciplinary action occurred.” 34 C.F.R. § 300.527(a). The regulation also creates a four-part test to determine whether a School District should be “deemed to have knowledge that a child is a child with a disability.” 34 C.F.R. § 300.527(b). This four-part test is as follows:

- “(1) The parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;
- (2) The behavior or performance of the child demonstrates the need for these services, in accordance with § 300.7;
- (3) The parent of the child has requested an evaluation of the child pursuant to §§ 300.530 – 300.536; or
- (4) The teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of the agency or to other personnel in accordance with the agency’s established child find or special education referral system.”

With respect to test number 1, the evidence on the record indicates that the Parents are literate, educated persons whose primary language is English. There is no evidence on the record that either of the Parents has a disability that “prevents a written statement.” Therefore, this test requires the Parents to have “expressed concern in writing” to personnel of the School District that the Student was in need of special education and related services” before the behavior that precipitated the disciplinary action occurred. There is no evidence on the record that the Parents expressed such a concern in writing before September 5, 2001.

With respect to test number 2, the evidence on the record indicates that while the Student did have a number of disciplinary detentions and referrals, his overall behavior and performance did not indicate to any of his teachers or other School District personnel that the Student had a need for special education and related services before September 5, 2001. None of the Student’s teachers or other school personnel who testified at the hearing stated that they considered the Student to have a need for special education and related services, or, in fact, a need to be evaluated for such services. Rather, the Student’s behavior was described as “immature” and the number of disciplinary detentions and referrals during school year 2000-01 was described by the school’s Assistant Principal as being in the “high average” when compared with the Student’s peers. Finally, during school year 2000-01, the Student’s grades were, on balance, above average – Two A’s, two B’s, one C and one failing grade during the last quarter of that school year. The comments of the Student’s grade reports and testimony of his teachers indicated that the Student’s academic deficiencies resulted from the Student’s failure to complete and/or turn in his assignments. That same evidence also indicated that during school year 2000-01, the Student made steady improvement in his classroom behavior. Likewise, the questionnaires prepared by the Student’s school year 2001-02 teachers and the summary prepared by Donra Yochum further substantiate this point. On balance, the record evidence shows that the behavior or performance of the Student before September 5, 2001 did not demonstrate the need for special education and related services.

With respect to test number 3, there is no evidence on the record that the Parents requested an evaluation of the child pursuant to 34 C.F.R. §§ 300.530 – 300.536 before September 5, 2001.

With respect to test number 4, as noted above, there is no evidence on the record that before September 5, 2001 any of the Student's teachers or other School District personnel expressed concern about the behavior or performance of the child to the School District's director of special education or to other personnel in accordance with the School District's established child find or special education referral system.

Accordingly, I find that the School District is not deemed to have knowledge that the Student was a child with a disability under the IDEA before the September 5, 2001 discipline was issued.

I also find, that the School District is not deemed to have had knowledge that the Student was a child with a disability under the IDEA "prior to taking disciplinary measures against the Student," a process which culminated on September 17, 2001.

54. **Remedy**— The Parents have requested as a remedy that the Student be placed in an appropriate placement during the remainder of the Student's disciplinary suspension — either in the regular educational classrooms at Barnwell Middle School or at the Metropolitan private school and that the School District conduct an independent educational evaluation for the Student.

**Decision** — Since I have found that the School District is not deemed to have knowledge that the Student was a child with a disability under the IDEA before the September 5, 2001 discipline was issued, no remedy is appropriate. Even if I had found to the contrary, the two remedies requested by the Parents are not within my jurisdiction in this expedited due process proceeding.

Finally, since I have also found that the School District is not deemed to have had knowledge that the Student was a child with a disability under the IDEA prior to taking disciplinary measures against the Student, a process which culminated on September 17, 2001, the treatment of the Student appears to be governed by 34 C.F.R. § 300.527(d).

#### **IV. ORDER**

55. The Parents' request for due process filed on October 1, 2001 is dismissed.

#### **V. APPEAL PROCEDURE**

**PLEASE TAKE NOTICE** that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter.



**PLEASE TAKE NOTICE** that you have a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, Section 536.010 *et seq.* RSMo. Specifically, Section 536.110 RSMo. provides in pertinent part as follows:

"1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within thirty days after the mailing or delivery of the notice of the agency's final decision....

3. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence...

**PLEASE TAKE NOTICE** that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. §300.512.

Dated: November 15, 2001

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Ransom A Ellis, III  
Hearing Officer

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was served upon each party to this action, to-wit:

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by depositing same in the United States mail at Springfield, Missouri, postage prepaid, duly addressed to said parties on this 15<sup>th</sup> day of November, 2001.

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Ransom A Ellis, III

Hearing Officer